

EXHIBIT 5

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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **OAKLAND DIVISION**

15 ELASTICSEARCH, INC., a Delaware
16 corporation, and ELASTICSEARCH B.V., a
Dutch corporation,

17 Plaintiffs,

18 v.
19 FLORAGUNN GmbH, a German corporation,

20 Defendant.

21 Case No. 4:19-cv-05553-YGR

22 **STIPULATION AND [PROPOSED]**
23 **ORDER REGARDING H. SALY**

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29 **STIPULATION AND [PROPOSED] ORDER**
30 Case No. 4:19-cv-05553-YGR

1 Pursuant to Civil Local Rule 7-12, defendant floragunn GmbH (“defendant”) and plaintiffs
2 Elasticsearch, Inc. and elasticsearch B.V. (“plaintiffs”), by and through their attorneys of record,
3 stipulate and move as follows:

4 WHEREAS, through this stipulation, the parties seek an order regarding their resolution of
5 a dispute regarding the deposition of Hendrik Saly, the Chief Technology Officer for defendant,
6 who was identified by defendant in its initial disclosures as a material witness;

7 WHEREAS, on November 25, 2020, plaintiffs proposed to defendant a date for Mr. Saly’s
8 deposition;

9 WHEREAS, on November 30, 2020, defendant represented to plaintiffs that (1) Mr. Saly
10 was currently on leave from his employment by defendant, (2) Mr. Saly had been on such leave
11 continuously since March 2020, (3) defendant did not know if or when Mr. Saly would return
12 from leave; and (4) defendant is unable to make Mr. Saly available to be deposed unless and
13 until he returns from leave;

14 WHEREAS, defendant (1) has provided plaintiffs with documentation supporting the basis
15 for Mr. Saly’s leave through January 27, 2021; and (2) has represented to plaintiffs that
16 (a) additional documentation showing the basis for Mr. Saly’s leave for periods past January 27,
17 2021 is expected to be provided to defendant and will be provided to plaintiffs; (b) defendant
18 does not anticipate that Mr. Saly will be able to return from leave to be deposed before March
19 19, 2021;

20 WHEREAS, plaintiffs contend that they will be unduly prejudiced if defendant’s experts
21 rely on information provided by Mr. Saly, because Mr. Saly will not be subject to cross
22 examination;

23 WHEREAS, defendant has represented that (1) Mr. Saly has not provided and will not
24 provide information to defendant’s experts; and (2) defendant’s experts will not rely on any
25 information from Mr. Saly, whether obtained directly or indirectly, as a basis for any of their
26 opinions or otherwise;

27 WHEREAS, the parties agree and stipulate that, in lieu of plaintiffs moving the Court to
28 order defendant to make Mr. Saly available for deposition or bar use of information from Mr.

STIPULATION AND [PROPOSED] ORDER
Case No. 4:19-cv-05553-YGR

1 Saly, and in order to prevent the prejudice to plaintiffs identified above: (1) defendant and its
 2 experts shall be permitted to use documents and communications created by, or within the
 3 custody of, Mr. Saly, that both (a) predate Mr. Saly's March 2020 leave from his employment,
 4 and (b) either (i) were produced by defendant to plaintiffs in this litigation or (ii) are otherwise
 5 publicly available, including to plaintiffs; (2) Mr. Saly shall be prohibited from providing, either
 6 directly or indirectly, any assistance, information, or evidence to any of defendant's testifying
 7 expert witnesses in this matter; (3) defendant's testifying experts shall be prohibited from relying
 8 on any assistance, information, or evidence provided, directly or indirectly, by Mr. Saly; (4)
 9 should Mr. Saly become available to testify at trial, the parties will meet and confer in an effort
 10 to agree on procedures that would eliminate prejudice to plaintiffs from Mr. Saly's late
 11 availability; but (5) in no event shall defendant's testifying experts rely on any assistance,
 12 information, or evidence provided, directly or indirectly, by Mr. Saly.

Moved (insertion) [1]

Deleted: , (1) Mr.

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Deleted: Saly; and (5) notwithstanding the foregoing,

Moved up [1]: defendant and its experts shall be permitted to use documents and communications created by, or within the custody of, Mr. Saly, that both (a) predate Mr.

Deleted: Saly's leave from his employment, and (b) were produced by defendant to plaintiffs in this litigation; (c) or are otherwise available to plaintiff

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Deleted: Saly; and (5) notwithstanding the foregoing, defendant and its experts shall be permitted to use documents and communications created by, or within the custody of, Mr. Saly, that both (a) predate Mr. Saly's leave from his employment, and (b) were produced by defendant to plaintiffs in this litigation, or (c) otherwise available to plaintiff

26 IT IS SO STIPULATED.
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1 Dated: February 22, 2021

DAVID R. EBERHART
JAMES K. ROTHSTEIN
DANIEL H. LEIGH
O'MELVENY & MYERS LLP

4 By: /s/ DRAFT
5 David R. Eberhart

6 Attorneys for plaintiffs
7 ELASTICSEARCH, INC. and
ELASTICSEARCH B.V.

9 Dated: February 22, 2021

10 WUERSCH & GERING LLP
V. DAVID RIVKIN

12 By: /s/ DRAFT
13 V. David Rivkin

14 Attorneys for defendant
FLORAGUNN GmbH

ATTESTATION

Pursuant to Civil Local Rule 5-1(i)(3) regarding signatures, I hereby attest that concurrence in the filing of these documents has been obtained from the other signatory.

Dated: February 22, 2021 /s/ David R. Eberhart
David R. Eberhart

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: _____